

NORMAN G. LAVERY

IBLA 86-1628

Decided March 31, 1987

Appeal from a decision of the Vale District Office, Bureau of Land Management, disallowing a mining plan of operations on the grounds it would impair the suitability of a wilderness study area for inclusion in the wilderness system. MCP 6-05 (Oregon).

Hearing ordered.

1. Administrative Procedure: Hearings -- Evidence: Sufficiency -- Federal Land Policy and Management Act of 1976: Wilderness -- Hearings -- Mining Claims: Generally

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

APPEARANCES: Matthew Y. Biscan, Esq., Denver, Colorado, for appellant;  
Donald P. Lawton, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Norman G. Lavery has appealed the July 29, 1986, decision of the Vale District Office, Bureau of Land Management (BLM), disallowing his mining plan of operations because the activities proposed would impair the suitability of the area for preservation as wilderness. See 43 U.S.C. 1782(c) (1982). In his statement of reasons for appeal, appellant included a request that the case be assigned to an administrative law judge "for a hearing and determination of the issues presented."

On November 10, 1986, pursuant to a Board order of October 8, 1986, BLM filed a response; the response stated BLM's belief that "sufficient information presently exists for a determination on the merits without the need for a hearing."

On December 23, 1986, counsel for appellant renewed his request for a hearing, alleging that examination of BLM employees was necessary in order to determine if they had properly assessed the visual impacts of appellant's proposed mining plan of operations in accordance with the techniques set forth in Part 8400 of the BLM Manual. Appellant argues:

The EA [Environmental Assessment] assigns Dr. Lavery's Plan of Operations visual impacts that are proportionally three times greater than similar man-made features already existing in the Wilderness Study Area (WSA). . . . The possible misapplication of visual ratings is an unresolved issue of material fact and consequently is the basis for a hearing under 43 CFR 4.415. Desert Survivors, 80 IBLA 111 (1984). The issue is unresolved because the government has not responded to Appellant's arguments that the EA is factually incorrect, yet asks that the decision of this Board be made on the record as it exists. The issue is material because the visual impacts of the Plan of Operations go straight to the heart of the "substantially unnoticeable" standard applied by Mr. Heft in the Decision. The extent to which Mr. Heft relied on the factually incorrect portion of the EA is also an issue of material fact. The Decision suggests that visual measurements were the most important consideration. Each of these factual issues are [sic] appropriate for consideration in an administrative hearing.

The July 29, 1986, BLM decision reads:

We have evaluated your Plan of Operations (MCP 6-05) to gain motorized ground vehicle access to your mining claims in the Dry Creek Buttes Wilderness Study Area and to conduct a mineral evaluation program on them. We have determined that your proposal for a drilling operation would impair the suitability of the area for preservation as wilderness, and therefore, the proposed drilling operation cannot be allowed. This decision is based on our determination that reclamation of the motor vehicle access route cannot be completed so that it would be substantially unnoticeable by 1990 when the Secretary of the Interior makes his recommendation to the President on the study area's suitability for inclusion

in the wilderness system. . . . Shallow soils, low precipitation and slow vegetative regrowth make restoration of the disturbed area highly unlikely within the short time allowed. . . . Access may be made by foot, horseback or helicopter.

Finding of No Significant Impact (FONSI)/Decision Record of the same date as the decision determines that the proposed mining plan of operations "would have significant adverse effects on the suitability of the affected portion of the Dry Creek Buttes Wilderness Study Area (WSA 03-56) for preservation as wilderness" and states that the determination "is based on the assessment that reclamation of the motor vehicle access routes cannot be completed so that they would be substantially unnoticeable by 1990. . . ." The document concludes by approving "the Non-Motorized Ground Access Alternative or motorized aerial access alternative as the decision of the Bureau."

The EA's description of the wilderness naturalness values of the affected environment states:

The affected area is located within the northern portion of the Dry Creek Buttes Wilderness Study Area (WSA). The WSA contains 51,800 acres of public land. . . . The Dry Creek Buttes WSA is generally natural because man-made features are substantially unnoticeable, both individually and cumulatively. Fifteen interior man-made features influence approximately 7 percent of the WSA. (The area of influence is an estimate of the acreage within the WSA from which the man-made features can be seen.) These man-made features are 2 fences totaling 4 miles, a reservoir, 2 guzzlers (small wildlife watering devices), 2 old abandoned horsetraps, a corral, a rock wall segment, 2 sheepherder monuments and several ways totaling 8 miles.

EA at 15-16.

The EA's description of the visual aspects of the affected environment states:

An evaluation of the scenic quality through the Bureau's Visual Resource Management System identified two scenic quality rating units within the Dry Creek Buttes WSA. The area affected by this proposal lies within the southern rating unit consisting of ridges and draws with intermixed flats. The scenic quality rating identified this

area as having medium scenic quality. ([F]or a detailed description of land form, vegetation, water, color, adjacent scenery, scarcity and cultural modifications which contributed to the scenic rating[.] refer to the Dry Creek Buttes WSA case file in the Vale District Office). The visual sensitivity of the affected area is high because of its location in a WSA, the biological sensitive area, and vehicle closure area. The visibility of the affected area lies within the seldom seen distance zoned from the nearest road. Based upon the scenic quality rating, sensitivity level and distance zone the area is in a visual resource management class III. Any actions within this management class which change any of the visual elements of form, line, color or texture may be evident, but should remain subordinate to the characteristic landscape.

EA at 19-20.

The EA's description of the environmental consequences of the proposed mining plan of operations on wilderness naturalness values states:

The proposal even after reclamation, will have created a visual contrast in the natural landscape influencing approximately 1800 acres or 3.5% of the WSA. The access route and drill pads will have disturbed the soil and vegetation resulting in both color and line visual element contrasts. (Refer to visual contrast rating - appendix A.) The construction of waterbars as a reclamation measure would create both line and visual contrast and, therefore, contribute to the accumulative [sic] impact on naturalness. Given the shallow soils and minimum precipitation restoration would be extremely difficult within the required time frame. The visual contrasts could be perpetuated if unauthorized use of access route continues after rehabilitation.

EA at 24-25.

The EA's discussion of the visual consequences states:

A visual contrast rating was used to evaluate the proposal and measure the degree of contrast between the activity and the natural landscape. The total contrast after reclamation is 24. Vegetation with a rating 15 is the highest feature contrast. A vegetation line contrast of 6 is the greatest element contrast. A feature score of 11-20 attracts attention and begins to

dominate the natural landscape. Even after reclaiming the route and drill pads, keeping vehicles off, and allowing natural restoration to occur or reseed, the contrast would not subside to a substantially unnoticeable condition within the 1800 acre view shed.

Id. at 28.

The EA's description of the environmental consequences of the non-motorized access alternative states:

There would be no impacts to any of the resource values from foot or horseback travel other than the trails made from passage of animals and people. The use of portable drills and drill pads would have minor impacts on vegetation, (including livestock forage and T & E [threatened and endangered] species), soil, wildlife and wilderness values. Impacts would be small in area, dispersed in location, temporary in nature and substantially unnoticeable. There would be no impacts from this phase of the operation on the other values addressed in section III [affected environment]. This form of travel would require more time to access the claims, and therefore, would encumber [sic] a greater labor and travel expense.

Id. at 30.

BLM's decision in this case is based on its determination that "reclamation of the motor vehicle access route cannot be completed so that it would be substantially unnoticeable by 1990." "Substantially unnoticeable" means something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering or biological change. 43 CFR 3802.0-5(m). See also 43 CFR 3802.0-5(d). In considering whether a proposed mining plan of operations meets this standard, BLM properly considers the effectiveness of mitigation measures that could be provided as stipulations to a decision approving the plan. Southwest Resource Council, Inc., 73 IBLA 39, 44 (1983). A plan may be amended to adopt an alternative that would avoid the impairing impacts of the initial plan. Golden Triangle Exploration Co., 76 IBLA 245, 249 (1983).

A BLM decision denying approval of a proposed mining plan of operations on the grounds that the activity proposed would impair the naturalness of a wilderness study area will be affirmed where an appellant fails to establish error in the decision. Keith R. Kummerfield, 72 IBLA 1 (1983); Keith R. Kummerfield, 74 IBLA 106 (1983). An appellant seeking reversal of a decision involving lands in a wilderness

area must show that it was premised either on a clear error of law or a demonstrable error of fact. Southwest Resource Council, Inc., *supra* at 42. The burden of persuasion by a preponderance of the evidence rests on appellant. C. Cody Soderstrom, 95 IBLA 382, 386 (1987); Committee for Idaho's High Desert, 85 IBLA 54, 56-57 (1985).

[1] Under 43 CFR 4.415 the Board has discretionary authority to refer a case to an administrative law judge for a hearing on an issue of fact. We have held, in response to a request for a hearing, that "[a] hearing is not necessary in the absence of a material issue of fact, which [,] if proven, would alter the disposition of the appeal . . . This Board 'should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them.'" Woods Petroleum Co., 86 IBLA 46, 55 (1985). In this case, appellant's pleadings and our review of the record have raised significant issues that cannot be resolved on the record before the Board. A hearing is therefore appropriate.

43 CFR 4.415 provides that if a hearing is ordered, "the Board will specify the issues upon which the hearing is to be held." Accordingly, the following issues are the subjects upon which the Board requests the parties to present evidence:

1. Which of the man-made features identified in the EA are located in the area of influence of the proposed mining plan of operations and what is their visual contrast rating in accordance with BLM Manual Handbook 8431-1, Visual Resource Contrast Rating (Rel. 8-30, 1/17/86).
2. Was the visual contrast rating for the proposed mining plan of operations conducted in accordance with BLM Manual Handbook 8431-1?
3. To what extent was the July 29, 1986, BLM decision that reclamation of the motor vehicle access route cannot be completed so that it would be substantially unnoticeable by 1990 based on the visual consequences of the proposed mining plan of operations? On what other specific consequences, if any, was the decision based?
4. Is the July 29, 1986, BLM decision in conformance with the objectives for Visual Resource Class III? See BLM Manual Handbook 8410-1, Visual Resource Inventory, (Rel. 8-28, 1/17/86).
5. What mitigation measures, if any, would be effective to make reclamation of the proposed motor vehicle access route substantially unnoticeable?

6. In making its July 29, 1986, decision, did BLM consider alternative alignment or methods of construction of proposed motor vehicle access route that would avoid impairing the suitability of the area for inclusion in the wilderness system?

In accordance with 43 CFR 4.415, this matter is referred to the Hearings Division for a hearing and initial decision on the issues indicated above. If appellant fails to show clear error of law or demonstrable error of fact, BLM's July 29, 1986, decision shall be affirmed. If appellant prevails, the case shall be remanded to BLM for re-adjudication. The decision of the administrative law judge shall be final for the Department, absent a timely appeal.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the case is referred to the Hearings Division for hearing and initial decision.

Will A. Irwin  
Administrative Judge

We concur

R. W. Mullen  
Judge

Administrative Judge  
Alternate Member

Anita Vogt

Administrative

